

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





# 76-1335

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To be argued by  
JULIA P. HEIT

In The  
**United States Court of Appeals**  
For The Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

vs.

MICHAEL DEMICHAELS,

*Appellant.*

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## BRIEF FOR APPELLANT

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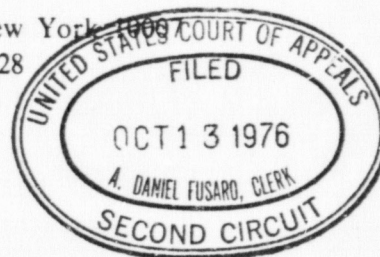
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UNITED STATES OF AMERICA,

v.

Appellant.

76-1335

## PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered July 8, 1976 in the United States District Court for the Southern District of New York (Carter, J.) convicting appellant after a jury trial of violation of Title 18 U.S.C. §1955, suspending his sentence, with the exception of 4 months, and fining him \$5,000.

## QUESTION PRESENTED

1. Whether after making the determination that the Government had proved multiple conspiracies instead of the single conspiracy charged in the indictment, the trial court should have declared a mistrial on the substantive count since the flood of evidence relating to the unrelated conspiracies rendered it impossible for appellant to receive a fair trial on the substantive count.

## STATEMENT OF FACTS

Appellant, MICHAEL DEMICHAELS, and eight co-defendants proceeded to trial before the Hon. Robert L. Carter on a two count indictment charging them with conspiring to violate Title 18 U.S.C. 1955 and the substantive crime as well.\*

The chief witness for the Government was MICHAEL CALISE, who in addition to his job as a truck driver, started picking up numbers that his father had been picking up before he died (370-71). He commenced his activities in September of 1968 and would pick up wagers in various establishments in Yonkers (373). He'd usually start at 10:30 a.m. and would be through at 1:30 p.m., working a six day week. According to Calise, he would turn his numbers over to the person who would run the bank and at that time it was his uncle, Joseph Calise (374). Calise explained that about 30 to 40 people were betting with him and his weekly handle was approximately \$700 to \$1000 per week (376).

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\*The eight other defendants named in this indictment who proceeded to trial were: Lawrence Centore, Peter Variano, James Ostrander, John Monaco, Michael Picciano, Anthony Russello, Alfonso Coletti, and Henry Bucci. Although named as defendants, the following individuals did not proceed to trial: Michael Yannicelli, Michael Evangelista, William Murty and Frank Gallella. Named as co-conspirators were Francis J. Millow, Angelina David and Morgan Davis.



Calise stated that he met Defendant Centore ("Black") at Bruno's Restaurant around September or October of 1968 (377). When Centore asked him if he were picking up numbers at Bruno's, he replied "no." Centore then warned him that he did not want him to pick up numbers there because they did not want him to take any action out of the place and also because they were paying off the police (378). Calise explained that Danny Marciano was also picking up numbers there (378). However, Nancy, the waitress, and Tony Bruno would tell the people at the restaurant to give him the action instead of Danny (378-79).

Thereafter, Centore told the witness that he could pick up numbers at Bruno's only if he gave Mike Yannicelli the action. Upon agreeing to this, Calise made arrangements with Yannicelli to give him the work (382). He was instructed to leave his policy plays in an envelope at one of the other runner's places of business before 1:30 p.m. each day. The designated place at this particular time was Jimmy Conte's on Elm Street (383).

Besides picking up the number wagers, Calise also picked up horse wagers. Yannicelli gave him two telephone numbers to call in his horse bets. Calise claimed that Centore was present at this time (383-84).

Calise further testified that he worked as a runner for Yannecelli and Centore for approximately four months (387). Since he was gambling heavily, he wanted extra income and went to talk to Centore to see if Yanicelli would give him a job in the organization. This occurred in March or April of 1969 (388). Although Centore represented that he would speak to Yannecelli about it, nothing happened. About a month later, Calise had still another conversation with Centore wherein Centore told him that he would work for Adams instead of Yannecelli (391). It was then arranged that Adams would give him a job picking up some of his accounts plus a piece of the action. Calise then started to pick up policy from six different accounts (392). He would give the envelope containing the horse bets to a man named Alex, and would give the number bets to Adams. He estimated that approximately \$5000 to \$7000 in wagers were placed with Adams (395).



Calise continued to work for Adams for six to seven months. However, Adams got sick and had to give up the business. Consequently, he started working again for Yannicelli as a pickup man and continued to work for him until August of 1971 (396-98). His collections centered primarily in the Yonkers area, but they also had accounts in Hastings, Eastchester, and Tuckahoe. His compensation for this work amounted to \$150 per week (399).

Based on his daily activities for that one and a half year period, Calise maintained that he was familiar with the codes which represented runners in Yannicelli's operation (399). Among these code numbers, he designated Appellant DeMichael's number as 19. He stated that appellant was situated at the Green Tavern in Hastings, and had about 10 to 12 runners of his own (402-04). Appellant dealt with both horse and policy numbers (404). According to Calise, Mike Millow was one of appellant's coded runners, "17." Millow had a soda shop on Lake Avenue in Hastings (406).

During this period, in August of 1971, Calise had a conversation with Centore regarding the money he owned the operation (414). Calise recounted that he had collected some money from a few accounts and then lost it at the racetrack. Centore came to Bruno's very early in the morning and called him outside. He then smacked the witness in the face and told him if he ever "screwed around with any of his money again he'd break my legs." (415) He gave Calise until the next day to come up with the money he owed (415). Calise borrowed the money from Nancy and Tony Bruno, and the next morning gave it to William Murty (416). He believed that Murty gave the money to Yannecelli (416). Because he was getting into trouble by gambling too much, he told Murty in August of 1971 that he was quitting the organization (417). For three to four months, Calise tried working at a regular job, but then asked Yannecelli if he could return to the organization (418). A few weeks later, he became a phone man in the horse office and would take bets there. The witness stated that generally two men would work the phones, the bettors would call and give their code names, and then place their bets (421). The men would write these bets down on dissolvable paper in case the police should come through the door (422). The accumulated wagers for the day were

wrapped in an envelope and marked "horse office." These envelopes would then be left in a mailbox for the night pickup men. In order to avoid apprehension by the police, they would change the location of the horse office every two weeks (422-23). During this particular period, all the horse offices were located in Westchester County, but the office was moved to the Bronx. It was their practice to rent apartments from people in the Bronx and pay them about \$150 per week for the use of their telephone. Calise maintained that his activities in the horse office continued into the middle of July of 1972 (424). He then started to help Jimmy Hopper total the results from the racetrack which would require him to work six days a week. In March of 1972, Defendant Murty checked all the number work. Murty would also meet all the pickup men and get the work from them to ascertain that everything was in order (424). The results of their calculations were placed on tapes which were delivered to each account on Sunday morning (427). Yannecelli would always receive a copy of this tape (428).

In August of 1972, Calise stated that they had to close down their operation for two weeks because the Feds were in town. When they reopened, Yannecelli wanted to hire all new faces to change the operation (430). Yannecelli then ordered him to hire all new pickup men. Although new men were hired to fulfill this function, Calise asserted that the accounts remained the same.



When Jimmy Hopper died in June of 1972, Yannecelli directed him to continue to run the horse office and directed Murty to continue to do the number work. Calise stated that he was doing all the paying and collecting. If there were a hit, he would have to pay the runners (432). During this period, it was necessary for him to see Yannecelli every day to discuss the business (433). He would occasionally see Centore and once had a conversation with him wherein Centore asked if he had seen Yannecelli. Centore then asked him if he had any money and Calise gave him \$130 (433). When Yannecelli learned of this he got very angry and warned Calise that it was up to him to take care of these things (434).

Calise then related the events which led to the termination of his employment with the organization on August 27, 1972 (435, 490). When Hopper died, Calise was doing all the paying and collecting for the organization. Unfortunately, he still had a problem with gambling. He used the money he collected to place his own bets and between the second week of July to August 27th, he lost \$16,000 at the track (435). There finally

came a point when he did not have enough money to pay the hits. Calise stated that he had to collect \$1700 from appellant's account and usually it was collected on Thursdays (435-36). Pursuant to his request, appellant gave him the money on Wednesday (436-37).

Calise then went on to claim that he knew the Defendant Variano. In the beginning of 1971, Calise would talk to Variano and Yannecelli at the Chema Lounge (437-38). Variano only mentioned that when he got back, things were going to change a little - things were going to be good (439).

Calise maintained that Yannecelli had been his boss. Although he asserted that all slips bearing the code numbers belonged to appellant's account, the witness did not remember ever personally picking up policy numbers from him (518).\*

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\*William McKenna, Assistant District Attorney of Westchester County, called as a witness in behalf of Defendant Centore, testified that Calise had been indicted for the crimes of promoting gambling in the first degree and possession of gambling records in the first degree. These crimes carried a maximum of four years. Thereafter, Calise jumped bail and a bench warrant was issued on December 11, 1973. Bail jumping was a felony in New York punishable by a maximum of four years. When Calise was finally apprehended, he would not co-operate with the federal government until he had some assurance regarding the state matters. He thereafter was permitted to plead guilty to a misdemeanor and received a suspended sentence (1090-1103).

ANGELINA DAVID testified that she has known Defendant Variano for 24 years and during this time, she was both his girlfriend and business acquaintance. In the beginning of 1973, Variano asked her to do his football pools for him commencing September 1st. She did not want to do it but as usual agreed to help him (635). Accordingly, she figured the football scores until the third week in December (637). She identified Bucci as Variano's partner, and alleged that together they had 20 to 25 accounts. Because Variano was such a perfectionist, he and Bucci continually argued (641-42). She therefore told Variano that Bucci could not come to the apartment anymore because of all the bickering (641). Miss David stated that both Pop Millow and Bucci had an account (642). At one point, according to this witness, Variano had to pay off under two point systems and therefore had to borrow the money to make the payoffs. Not only did she loan him some money, but also he had to borrow it from other people around town. This took place during the second week of December.

David claimed that in July of 1973, Variano had told her that he was in sports, policy and horses (647). On occasion, she would go with him when he would collect



the money from the bets and actually saw money exchanged (647). However, she never overheard any conversation with anyone with whom he was exchanging money (650). The last time she saw Variano was two days before Christmas of 1973 (650). This witness concluded her testimony by characterizing Variano as a "bum" and further stated that "I don't hate him, but he used me and I just resented him." (653).

THERESA BELARDO testified that she had resided at 929 East 213th Street in the Bronx for 47 years and had the same phone number for the past 20 years. She met Michael Evangelista in the spring of 1974. He asked her if she would like to earn some money for the use of her phone for incoming calls (718). After giving her permission, Evangelista used her phone for three weeks (720). He would generally arrive at 10:30 a.m. and leave at 1:30 p.m. In the evenings, he would arrive at 6:00 p.m. and leave at 8:00 p.m. (719-20). She personally observed him using the phone and writing down information. The telephone would ring approximately once every two minutes (721). After this three week period, Evangelista disappeared (722). He again appeared at the end of November or the beginning of December of 1975. He would then use the phone in the same manner as he did previously. On New Year's eve, F.B.I. agents arrested him in her apartment (724).

SPECIAL AGENT RAYMOND J. TALLIA testified that on July 16, 1975 in the Red Coach Grill in Yonkers, he overheard parts of Variano's conversation with another man (1232-34). There were comments made about a \$50 bettor, sports and a reference to "Larry." (1230) Centore then joined the two men.

On February 10, 1976, while in the library of the Strike Force of the Southern District of New York, he overheard a remark by Centore. Present at this time were Variano, Russillo, Picciano, appellant, Monaco, Galella, Bucci and Evangelista. Centore read the indictment and commented to Yannecelli, "I don't recognize some of your partners, Mike." (1218) Yannecelli put his hands in front of his face and warned him "Don't say anything." (1219).

#### SEIZURES OF EVIDENCE

Law enforcement officials seized the following evidence from respective defendants and co-conspirators which was introduced into evidence:

On October 9, 1970, Joseph DiSciori, Criminal Investigator with Westchester County's District Attorney's office, executed a search warrant at Apartment 3-G,



82 Given Street, Yonkers, New York (340). Numerous envelopes containing slips of paper on which were written mutuel horserace policies were seized, along with other pari-mutuel slips, which were found in a brown suitcase. Yannecelli was the sole occupant of the apartment (340-42).

On September 3, 1974, James Trotta and Detective William Drain, members of the Yonkers Police Department, arrested Defendant Monaco who at that time was driving a brown 1972 Ford (354-55). Monaco was stopped because they knew he was operating a vehicle without a driver's license (356-57). While Officer Trotta was taking this vehicle to the police pound, three white envelopes fell from the sunvisor into his lap (357). He recognized that the envelopes contained gambling records. Monaco was then placed under arrest for possession of gambling records. Thereafter, at the police station, a search of Monaco's person revealed four more white envelopes containing gambling records (357-58).

On November 23, 1974, Carmine DiFalco executed a search warrant at the Headless Horsemen Center at Beckman Avenue in North Tarrytown (622). Gambling paraphernalia was found.\* According to DiFalco, Defendant Bucci was one of the persons who was present at this location (624).

On December 27, 1974, Robert C. Reutter, Special Agent with the F.B.I., executed a search warrant at Gunhill Boston Post Road (349). Defendant Picciano, who was driving a brown Corvair, was arrested at that intersection. His car was then searched and a package was found in a brown paper sac which contained policy slips (351-52, 860). On this same date, Harold Kain, Jr., Investigator for the Westchester County District Attorney's staff, executed a search warrant in which the Defendant Murty was named as the designated target. Murty was observed parking a car on Gunhill Road in the Bronx. After Murty was shown the search warrant, he said the work was under the front seat of his car. An envelope was then removed which was found

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\*This evidence consisted of lists of football games with lines (Gov.Exh. 29), football slips (Gov.Ex. 27), and records of wages and accounting records. These football wagers and accounts represented games played during the months of October 1974 through December 1974 (853059). Counsel for Bucci conceded that his client's fingerprints were on Gov's. Exh. 29 (935). The Government urged that said evidence was part of the Variano operation (834-35).

to contain numerous policy slips (828).

On December 31, 1974, three separate searches were conducted. First, Detective Sergeant Richard Spota, participated in the execution of a search warrant at 25 Cedar Street in North Tarrytown. Anthony and Francis Milow were specifically named in the warrant. Various gambling paraphernalia was found such as two racing forms, a cigar box containing policy slips, a black book containing digit numbers, and a calendar with three digit numbers set forth on each date on the calendar. During the search, Defendant Bucci came to the door and told the Agents that he was looking for fish that was in the refrigerator (584). Second, Gregory Albanes executed a search warrant at 929 East 213th Street in the Bronx. When they entered the apartment, Evangelista went into the bathroom and tried to wash the paper in the sink, since it was rice paper and water soluble (812-13). However, he was prevented from destroying the paper, and the officers were able to recover the slips of paper that were left (813). And third, Frank Santarsola, Criminal Investigator with the District Attorney's office in Westchester County, entered Apartment 1 at



211 Third Avenue in Palham, New York pursuant to a search warrant. Defendant Russillo was in the apartment when the officers found gambling records for football and basketball games in a small bedroom off the master bedroom (818, 865-68).

Thereafter, on September 2, 1975, William Skelton, Criminal Investigator with the Westchester County Sheriff's office, executed a search warrant at the intersection of Park Avenue and Ashbury Avenue in Yonkers (361). An individual named Peduto and several vehicles were designated as targets in the warrant. Policy slips were found in several of the cars and two small brown paper bags were seized (361-62).

Finally, on November 12, 1975, another search warrant was executed for two individuals designated as John Does who were later identified as Benedetto Conte and Defendant Picciano (364). Envelopes containing policy were found on Conte's person (366).

#### SURVEILLANCES

Detailed evidence encompassing the surveillance by various Government officials of many of the defendants

and co-conspirators was also elicited from Government witnesses.

On March 1, 1974 and March 19, 1974, Agent Wilhelmi observed Joseph Millow enter the Green Tavern in the town of Hasting on the Hudson, where he remained for only three minutes (702). On April 9, 1974, this same Agent observed appellant leaving the Green Tavern at 1:48 p.m. At approximately 1:50 p.m., Joseph Millow was sitting in a parked car across the street when another male approached him, handed him something, and talked with Millow for a short while (710). On this same date at 1:55 p.m., Special Agent Carl Amaditz observed Variano standing in the window of the Green Tavern. He then saw Yanneccelli enter this establishment and ten minutes later, the two men left together. Three minutes later, Joseph Millow also left the tavern (745).

On April 15, 1974 at about 1:09 p.m., Agent Wilhemli observed appellant looking out the window from inside the Green Tavern. He exited the restaurant at 1:17 p.m., talked to a man in a Chrysler, and went back into the restaurant. Appellant again left the Tavern

and was observed carrying a paper bag. He went into 10 Main Street. At 1:30 p.m., Joseph Millow went into the Green Tavern and remained there for two minutes (707-08).

On April 18, 1974, Special Agent McMurty observed Yannecelli leave the Green Tavern at 1:00 p.m. He then observed Yannecelli and Variano talking with "Pop" Millow in the Municipal Parking lot across the street (739-40). On this same date, Special Agent Clark observed Millow stop at a traffic light on Main Street, which was in the vicinity of the Green Tavern. A car driven by Yannecelli with Variano as a passenger stopped at the intersection. When both vehicles pulled over, Millow got out of the car and leaned into the passenger side window of Yannecelli's car (742).

Agent Wilhelmi, on November 18, 1974, observed Anthony Russillo and an unknown male get into a white Buick parked at 211 Third Avenue in North Pelham. At 1:44 p.m., Joseph Millow arrived at the same address, reached into the mailbox, and entered the residence. At 1:49 p.m., he picked up a newspaper that the mailman



had left, again reached into the mailbox and went back into the house. He then left the building (710-11).

On December 10, 1974, Special Agent Reutter followed Evangelista to the area of 239th Street and Bronx Boulevard, where he walked to a vehicle which the Defendant Murty was driving. Defendant Picciano was standing by the car window (750). The Agent thereafter observed Picciano driving a brown Corvair in which Evangelista and Defendant Ostrander were passengers (750). In the meantime, Agent Wilhelmi was in the vicinity of 949 East 214th Street in the Bronx. At 1:13 p.m., he observed Evangelista walking down the driveway of that address and getting into a cab. Two days later, he also observed Evangelista leaving this address. He then observed Picciano get into a parked car in that vicinity and drive away (777).

On December 13, 1974, in another surveillance of 239th Street and Bronx Boulevard, Agent Reutter observed Murty and Evangelista in their respective cars. They stopped and spoke to each other. After they left the

area. Agent Reutter observed Defendant Monaco driving a white Buick in which Evangelista was a passenger. The two men met Defendant Picciano in the center of the street (754).

On December 18, 1974, Agent Reutter conducted a surveillance of East 216th Street in the Bronx. At about 1:00 p.m., Defendant Murty arrived and parked his car. Evangelista parked behind him a few minutes later and handed Murty a brown paper bag. At 1:43 p.m., he saw Murty driving his car, followed by Defendant Ostrander (756-58).

#### ELECTRONICALLY INTERCEPTED CONVERSATIONS

Finally, the Government in order to prove their case, relied on numerous electronically intercepted conversations, all of which concerned various defendants either arranging bets or talking about the gambling business. It should be noted that appellant was not a party to these conversations, nor was his name ever mentioned in any one of these conversations.



Defendant Variano was party to two conversations.\* On November 14, 1973, Variano asked Joe "How's the football? Good huh?" Joe in turn responded, "Yeah, makin' a few dollars." Variano concluded the conversation by stating, "Now if you have any problems, don't forget to leave word in the office." Thereafter, on November 23, 1974, another conversation ensued between the two men. When Variano asked what happened to the bank, Joe informed him that they got picked up in the store before twelve o'clock by the "locals." Joe opined "That's what happens when you don't pay up." The two men then made arrangements to meet at the Green Tavern in 15 minutes.\*\*

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\*Agent Wilhelmi claimed he recognized Variano's voice on these tapes since he heard his voice again on February 10, 1976 for about three to four minutes (1140). Additionally, the Agent heard his voice on February 10, 1974 while he escorted Variano to the New York office (1140-45).

\*\*Wilhelmi stated that as a result of this conversation, they instituted a surveillance at the Green Tavern where they observed Variano and Millow meet in the parking lot across the street (1139)

It was the Government's stated intention to connect all the reputed gambling activities of the defendants and co-conspirators through the testimony of Francis Millow. However, Millow refused to testify and was held in contempt by the court.

At the conclusion of the Government's case (1237), all counsel argued for a dismissal of the conspiracy count on the ground that the Government had proved multiple conspiracies instead of the single conspiracy charged in the indictment. The court agreed with counsels' arguments and dismissed the conspiracy count, setting forth its reasons as follows:

I have concluded that the conspiracy count must be dismissed as to all the defendants, because there is a variance between the government's theory of the case and its proof.

Let me briefly indicate my reasons. There are at least two time frames, and probably three, that have been set forth in this record, and they are separate and distinct. The first is from 1968 to 1972 involving Centore and DeMichaels as far as the defendants in this case are concerned.

The second is in 1973 involving Variano and Bucci. I suppose we can merge that with the 1974 time frame because Mrs. David was talking about football bets, and obviously football bets occur in the fall and in the winter. So that under that we can reduce the time frame to two. And that time frame involves Variano and Bucci linked to football betting in 1974, as is Coletti and Russillo. And Picciano, Ostrander and Monaco are linked to numbers in 1974.

Now it is true that this trial was not as extensive as Bertolotti on which I rely for the position I am taking, but I think

that the principle which is applied in that case has to govern disposition of the case here.

As I understand it, the principle is that in a multi-defendant trial where one defendant is required to sit through lengthy testimony which in no way involves him, that this is prejudicial and damaging.

Let me just give you a few examples. As I recall the testimony, Centore's name was mentioned at the beginning, and DeMichaels, and they hadn't been heard of since in terms of the conspiracy.

Mr. Coletti, I had forgotten that he was even on trial until yesterday when suddenly his name was mentioned in some wiretap conversations. One segment of the proof involved the three, apparently younger defendants, Picciano, Ostrander, Monaco, but they have not been linked to the others, and another concerned Russillo, Variano and Bucci. But nowhere are they linked to these other people in terms of time frame.

Under those circumstances it is clear to me that Centore, DeMichaels, Coletti, Picciano, Ostrander and Monaco were prejudiced by the variance, and as to them I am clear that the count must be dismissed.

I am certain that Russillo was prejudiced as well. While I do have some doubts that Variano and Bucci were prejudiced in the sense that I am talking of, since there was a great deal more testimony over a longer time span involving them, I resolved the doubt in their favor and we will dismiss the count as to them.

Now, the substantive count I reach an entirely different conclusion on. I think that there is sufficient testimony from Calise to send to the jury as to Centore and DeMichaels, the question of their violation of Count 2. While Mr. Panzer indicated that the evidence seized related to 1970, which may be true, my recollection is that Calise testified that the operation continued until he left in August of 1971, and that it involved a large number of people and money. And I think that under the circumstances that as to those two, a prima facie case has been made to come within the statutory requirements.



As to Variano, Coletti, Bucci and Russillo, the evidence links all of them to Milloy, and to each other. Thus, I have decided to send the case, as far as they are concerned on the substantive count, to the jury.

Picciano, Ostrander and Monaco are linked together and to Evangelista and Murty and, therefore, I am sending the case involving them on the substantive count to the jury.

While I realize that there is a danger here that either Mr. Mitchell or Mr. Panzer pointed out with the conspiracy count being dismissed of a spill-over of fact as regards the hearsay testimony, I think that that problem need not be overemphasized in this case. The jury has been carefully instructed throughout the trial that the testimony coming in should be used only against the person who participated, and they will also be so instructed at the close of the trial in terms of their consideration of the evidence.

Get the jury in, please.

Counsel thereafter argued that because of the conspiracy dismissal, the court should likewise dismiss the substantive count. Counsel asserted that first, since the elements of the conspiracy charge and the substantive charge were similar, the Government was collaterally estopped from proving the latter. And second, counsel contended that the jury could not objectively determine the defendants' culpability on the substantive counts because of the prejudicial spill-over of the voluminous amount of evidence emanating from the multiple conspiracies. Although the court denied counsels' motions,

it did acknowledge that it had difficulty with counsels' last contention which, in the opinion of the court, should be resolved by the Court of Appeals (min. of 7/8/76, pp. 27-28).

ARGUMENT

POINT I

AFTER MAKING THE DETERMINATION THAT THE GOVERNMENT HAD PROVED MULTIPLE CONSPIRACIES INSTEAD OF THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT, THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL ON THE SUBSTANTIVE COUNT SINCE THE FLOOD OF EVIDENCE RELATING TO THE UNRELATED CONSPIRACIES RENDERED IT IMPOSSIBLE FOR APPELLANT TO RECEIVE A FAIR TRIAL ON THE SUBSTANTIVE COUNT.

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After repeatedly admonishing the Government to terminate their practice of lumping a number of unrelated conspiracies into a single indictment, this Court in United States v. Bertolloti, 529 F.2d 149 (2d Cir. 1976) finally decided that such tactics could no longer be tolerated. This Court was of the view that it was virtually impossible for the jury to ~~sort~~ out the evidence relating to each defendant and thus to try him under these circumstances deprived him of his Due Process right to a fair trial. The present case now requires this Court to determine the critical question of whether once the trial court makes a determination that multiple conspiracies were proven by the Government, ~~must it~~ then declare a mistrial on the remaining substantive counts. We submit that under the unusual circumstances of this case, this question must be answered affirmatively.



At the outset, it is first necessary to dispell any notion that the Government cannot be held responsible for the resulting multiple conspiracies, since it was their hope that Francis Millow would be the witness to connect the various activities of the defendants and co-conspirators into one conspiratorial endeavor. When framing the indictment, the Government assumes the risk that they will be able to sustain the accusations contained therein, since the burden rests upon them to establish guilt beyond a reasonable doubt. Certainly, the defendant cannot be held accountable for the Government's failure of proof, be it deliberate or otherwise. In any event, the issue here should not be construed as one of culpability, but the focal point of the case should rest on whether appellant's right to a fair trial on the remaining substantive count was so impaired that Due Process now requires the granting of a new trial.

Given the unusual facts of this case, there is no conceivable way that the admitted Bertolloti error can be construed as harmless. Not even the most intelligent

of jurors could disregard the deluge conspiratorial evidence that permeated this case, and concentrate solely on the substantive count. This is especially true in appellant's case, since the evidence regarding his guilt on this latter count cannot by any means be deemed overwhelming, but was indeed minimal in comparison to the evidence against the remaining defendants. cf. United States v. Young, \_\_\_\_ F.2d \_\_\_\_ (2d Cir, decided 9/14/76).

The facts are undisputed that the jury was exposed to extensive evidence regarding at the very least, three separate conspiracies in three different time frames. The court, in dismissing the conspiracy counts, found this to be the case. Hence, the Government's evidence consisted of a hodge-podge of personalities, each working to make their own endeavor a personal success. Notably, the Government's proof was so loosely knit that one versed in the law, let alone a lay jury, would find it difficult to sort out which defendant or co-conspirator was working for which particular operation.

It appears that the Defendants Variano and Bucci's prime advocacy was their football pools, which commenced in September of 1973. Defendants Coletti and Russillo were



also linked to football betting in 1974. At no time did the Government link Appellant DeMichaels to any of these enterprises. In the Spring of 1974, co-conspirator Evangelista had his own number system in operation in the Bronx, which continued into 1975. It can be presumed that his cohorts were the Defendants Picciano, Ostrander, Murty, and Monaco. Again, the Government did not connect appellant to these nefarious activities. As the court noted, Appellant DeMichaels was mentioned only briefly at the outset of the Government's reputed single conspiracy theory, but the proof thereafter was conspicuously lacking of any mention of him. Yet, appellant, by virtue of the conspiracy charge, was forced to endure the highly prejudicial effects of having a host of Government agents, as well as local law enforcement officials testify to a number of seizures of evidence that were totally unrelated to his own case. In 1974, Defendant Monaco was seized with gambling records after detectives stopped his car; gambling paraphernalia was seized at the Headless Horsemen Center in the presence of Defendant Bucci; different searches at different times of Defendants Picciano and Murty uncovered policy slips. Finally, in late 1974, more gambling evidence was seized when three separate and successful searches were conducted

of the Milow residence, Evangelista's apartment, and Defendant Russillo's apartment. The searches continued into the year 1975 when the Government found policy in several cars, including cars belonging to individuals named Peduto, Conte, and Defendant Picciano. Further bolstering their case, the Government introduced into evidence a series of seemingly innocuous surveillances involving the aforementioned individuals which had nothing whatever to do with appellant.

It is in the light of this overwhelming evidence concerning the conspiratorial activities of the other defendants, that the sparse evidence against Appellant DeMichales on the substantive count must be viewed. The only evidence against him consisted of Calise's naked allegations that appellant was involved in the Yannicelli operation; that his code number was 19; and that he had a number of runners of his own operating from the Green Tavern. Most of Calise's testimony relating to appellant was based on sheer hearsay. On only one or two occasions did he ever pick up policy slips from appellant. In addition, Joseph Milow, Yannicelli, and Variano were observed on a number

of occasions in the vicinity of the Green Tavern -- a restaurant open to the public. Coincidentally, their appearances at this establishment occurred around lunchtime, and hence, this evidence should be given only the minimal probative value it deserves. This was the sum total of the Government's case against appellant. The Government perhaps might argue that the 1970 search of Millow's premises revealed policy numbers allegedly belonging to appellant. Despite the fact that the 1970 evidence might have had some probative value in regard to the conspiratorial activities of the defendants, it could have no relevance to the substantive count. Appellant was charged with a substantive crime occurring after April of 1971. Yet, we think it highly improbable that the jury could and would draw this vital distinction.

Aside from the traditional prejudice that inures to a defendant when swept into multiple and unrelated conspiracies, the prejudice to appellant was further exacerbated by the fact that the proof of the substantive crime (Title 18 U.S.C. §1955) was so very similar to the proof required to sustain the alleged single conspiracy. In fact, the precise



question of whether the crimes were so similar in nature so as to mandate the merger of the conspiracy count was litigated recently in Ianelli v. United States, 420 U.S. 770 (1975). The Supreme Court agreed that the essence of both the conspiracy and the substantive count charged under §1955 was an agreement to conduct an illicit gambling enterprise by five or more persons. Although the Supreme Court decided against the merger theory in that particular case, it did not consider the prejudicial consequence of joining the two crimes together in a single trial when the proof regarding the conspiracy charge was fatally defective. In this context, former Justice Douglas' dissent assumes paramount importance for the purposes of this case. Justice Douglas was of the opinion that the very same transactions among the defendants should not give rise to criminal liability under both the substantive and conspiratorial statutes. Hence, the purpose of the Ianelli case here is only to demonstrate the striking similarity of the two crimes. Under these circumstances, there was no way any jury, even guided by the most stringent instructions from the court, could disregard the bulk of hearsay evidence pertaining to the conspiracy charge and not permit it to influence its determination on the similar substantive charge. It would be an indulgence in pure fiction to hold otherwise.

Aside from the similar nature of the crimes involved in this case which had to adversely influence the jury against appellant, this Court in Bertolloti also discussed other factors which would affect a defendant's right to a fair trial and require a reversal. According to this Court, the prejudice resulting from the variance increases with the number of defendants tried, and the number of conspiracies proved. Here we have at least three separate conspiracies; nine defendants on trial; three other defendants; and three co-conspirators. Moreover, the acts encompassed a prolonged six year period. It was thus impossible for appellant to defend himself against the separate transactions of his co-defendants and co-conspirators over a 6 year period. The jury simply could not give appellant's case the individual consideration which he clearly deserved.

Consequently, because appellant could not receive a fair trial on the substantive count once the trial court found as a matter of law that the Government proved multiple conspiracies, appellant should now be granted a new trial on the substantive charges.

POINT II

PURSUANT TO THE RULES OF THIS COURT, APPELLANT INCORPORATES BY REFERENCE ALL APPLICABLE POINTS RAISED IN THE BRIEFS OF HIS CO-DEFENDANTS.

CONCLUSION

IN ACCORD WITH POINT I, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

September, 1976

Respectfully submitted,

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Attorneys for Appellant



UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

MICHAEL DEMICHAELS,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
1027 Avenue St. John, Bronx, New York  
That on the 27 day of Sept 1976 at 1 St. Andrews Plaza New York, N.Y.

deponent served the annexed

Robert Fiske, Jr.

upon

the attorney in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the Attorney(s) herein.

Sworn to before me, this 27  
day of September 1976

Beth A. Hirsh

BETH A. HIRSH  
NOTARY PUBLIC, State of New York  
122 West 10th Street  
New York, New York 10011  
Qualified to perform duty  
Commission expires March 3, 1978

Victor Ortega

VICTOR ORTEGA